In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 279

EDWARD W. ANSPACH AND WALTER F. TURNER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8; Vol. II, 3-11) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1962 (Vol. II, 3, 12; Pet. App. 1). The petition for a writ of certiorari was filed on July

27, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether testimony as to conversations between a defendant and a third party in a hotel room, which were overheard by a postal inspector in an adjoining room without the use of any listening device and without any physical intrusion into the room, was properly admitted into evidence at the trial.

STATEMENT

After a jury trial in the United States District Court for the District of Colorado, the petitioners were convicted on 12 counts of an indictment charging mail fraud (Vol. I, 3-12, 20, 21). In November 1960, each petitioner was sentenced to serve concurrent terms of imprisonment of two years on each count (Vol. I, 20, 21). The convictions were affirmed on appeal, one judge dissenting (Vol. II, 3-11, 12; Pet. App. 1-8).

1. The evidence (the sufficiency of which is not contested) showed that the petitioners in 1958 formed the Beneficial Business Loan Service Corporation which, at their direction, represented to small business owners that it had money available for loan purposes, that an advance fee was required for processing a loan, but that the fee would be refunded in the event that a loan application was not accepted. Salesmen hired by the corporation represented that the corporation had a substantial amount of money available

for lending purposes, that over 90% of the loan applications accepted by the company resulted in the placement of loans, and that the advance fee from the business owner was needed in order to protect the company in the event that the business owner refused to accept the loan once his application had been accepted and the loan placed for him. The company had no funds to lend, and few, if any, loans were ever placed (Vol. I, 112-113, 116-117). In the meantime, loan applications were rejected and the advance fees were for the most part not refunded (Vol. I, 112-113, 117-118). Letters were mailed to business owners throughout the country informing them of loan opportunities from the Beneficial Business Loan Service Corporation (*e.g.*, Vol. I, 163).

The evidence also showed that the petitioners hired one Wayne Russell, who had been associated with the Morgan Engineering Company of Lake Charles, Louisiana, as national director of the lending corporation. The petitioners subsequently entered into a contract with the Morgan Company whereby, for 15% of the fees received by the lending corporation, Morgan would prepare brochures for use in the loan program and would "process" all loan applications and contracts (Vol. I, 108-109). Morgan failed to perform under the contract and in February 1959 was in possession of a number of loan contracts from business owners (Vol. I, 109; see Vol. I, 122).

2. At the trial, postal inspector Marshall testified that on February 9, 1959, he accompanied Russell to the Biltmore Hotel in Los Angeles and rented a room adjoining one occupied by Russell (Vol. I, 118,

119-120, 122; 123). The two rooms were connected by adjoining doors, one opening into Russell's room and one opening into Marshall's room (Vol. I, 121). By prearrangement with Marshall, Russell invited petitioner Anspach to his room (Vol. I, 119-120, 123). Marshall opened the door of his room and sat near the closed door of Russell's room, where, without the aid of a listening device, he overheard the conversation between Russell and Anspach (Vol. I, 121-122). Russell demanded payment from the lending company for certain salary and expense items (Vol. I, 110). Anspach refused. Then, as related by Marshall (Vol. I, 122):

> I heard Mr. Russell, whose voice I knew, tell Mr. Anspach the contracts were there in Los Angeles, these client contracts which had been down at Morgan Engineering Company, and were shipped back.
>
> Some discussion went on that I didn't hear, and I heard Mr. Anspach laugh very loudly and jovially, and say, "You just keep them. This thing couldn't have worked out better for me if I had planned it. This is just what I want. You just keep the contracts."
>
> And I heard him laugh when he said that. He said, "Russ, it couldn't have been better for me if it was planned."

Over objections of counsel, the court ruled that Marshall could testify to what he had heard that day (Vol. I, 120-121).

ARGUMENT

Marshall's testimony as to the conversations which he overheard was properly received into evidence. It is settled law that eavesdropping which does not involve an "unauthorized physical encroachment within a constitutionally protected area" does not violate the Fourth Amendment. *Silverman* v. *United States*, 365 U.S. 505, 510; *Goldman* v. *United States*, 316 U.S. 129, 134-135; *On Lee* v. *United States*, 343 U.S. 742, 751-754. See *Olmstead* v. *United States*, 277 U.S. 438, 457, 464-466. While this Court in *Silverman* indicated that it would not extend the *Goldman* case, the instant case does not go as far as *Goldman*. There federal officers overheard conversations in an adjoining room by placing a detectaphone against the wall on the outside of that room. Here Marshall from his own room merely listened with his unaided ears to conversations in an adjoining room (Vol. I, 121-122). The fact that Marshall opened the door into his own room involved no physical intrusion of any kind into the room behind a separate closed door where petitioner was a visitor.[1]

---

[1] An independent ground supporting the propriety of Marshall's conduct, though not relied upon by the court of appeals, is that it was consented to by Russell and would thus have been lawful even if there had been an intrusion into Russell's room. The record is somewhat sparse as to the relationship between Russell and Marshall, but Russell's action in accompanying Marshall to Los Angeles, taking a hotel room adjoining Marshall's, and inviting petitioner Anspach to his room leaves no doubt that Russell was cooperating with Marshall for the very purpose of obtaining evidence against petitioners and that Marshall's eavesdropping was done with Russell's knowledge and consent.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

AUGUST 1962